

# Departing from *Teague*: *Miller v. Alabama*'s Invitation to the States to Experiment with New Retroactivity Standards

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## I. INTRODUCTION

Don't miss the forest for the trees—this adage is often handed down to 1Ls approaching their first round of exams. The point is to get students to focus their sights on the broader trends in the law and not the idiosyncrasies of each individual case. In the summer of 2012, the Supreme Court overturned the life without parole sentences being served by Evan Miller and Kuntrell Jackson for homicide.<sup>1</sup> The Court held that these sentences violated the Eighth Amendment because they were mandated upon conviction of homicide, which prevented the judge from taking into account any mitigating circumstances that may have lessened the culpability of these two juvenile offenders.<sup>2</sup> Standing alone, the new rule announced in *Miller v. Alabama* is a tree; it merely requires a judge to give a juvenile's case individualized consideration before imposing a sentence of life without parole.<sup>3</sup> But, such a narrow interpretation of *Miller* misses the forest of Eighth Amendment jurisprudence.

Since June 2012, state courts have been embroiled in a debate over whether *Miller v. Alabama* applies retroactively to cases that have already reached their final disposition. Though binding only on the federal courts,<sup>4</sup> the *Teague* standard has been the weapon of choice for all eleven state supreme courts that have addressed the issue of whether *Miller* applies retroactively.<sup>5</sup> The *Teague* retroactivity doctrine establishes a general rule of nonretroactivity for new rules with two limited exceptions for substantive rules and “watershed” rules of criminal

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<sup>1</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

<sup>2</sup> *Id.* at 2460.

<sup>3</sup> *Id.* at 2469.

<sup>4</sup> *Danforth v. Minnesota*, 552 U.S. 264, 280–81 (2008).

<sup>5</sup> See *People v. Davis*, 6 N.E.3d 709, 721–23 (Ill. 2014); *State v. Ragland*, 836 N.W.2d 107, 116–17 (Iowa 2013); *State v. Tate*, 130 So. 3d 829, 834–35, 839–41 (La. 2013); *Diatchenko v. Dist. Att'y*, 1 N.E.3d 270, 278, 280–82 (Mass. 2013); *People v. Carp*, 852 N.W.2d 801, 818–41 (Mich. 2014); *Chambers v. State*, 831 N.W.2d 311, 323–31 (Minn. 2013); *Jones v. State*, 122 So. 3d 698, 701–03 (Miss. 2013); *State v. Mantich*, 842 N.W.2d 716, 723–24, 729–731 (Neb. 2014); *Petition of State*, No. 2013-566, 2014 WL 4253359, at \*3–5 (N.H. 2014); *Commonwealth v. Cunningham*, 81 A.3d 1, 8–11 (Pa. 2013); *State v. Mares*, 335 P.3d 487, 504 (Wyo. 2014).

procedure.<sup>6</sup> The *Teague* standard is no stranger to criticism.<sup>7</sup> *Miller v. Alabama* illuminates one of *Teague*'s fundamental flaws—its inability to account for rules that consist of both substantive and procedural components. Eight states have put *Miller* through the *Teague* analysis and a consensus has yet to develop over whether *Miller* is substantive or procedural.<sup>8</sup>

The difficulty in classifying *Miller* as either substantive or procedural has led some courts to place it somewhere in between. Judge Wilson, concurring in the Eleventh Federal Circuit's retroactivity decision, suggested that *Miller* is better classified as a "quasi-substantive" rule.<sup>9</sup> Echoing Judge Wilson's sentiment, the Nebraska Supreme Court did not classify *Miller* as either substantive or procedural, but rather applied *Miller* retroactively because it is "more substantive than procedural."<sup>10</sup> Finally, in holding that *Miller* is not retroactive as a procedural rule, the Pennsylvania Supreme Court dedicated a significant portion of its opinion in *Commonwealth v. Cunningham* to a discussion of *Teague*'s limitations.<sup>11</sup> Judge Castille, in his concurrence to *Cunningham*, lamented the "seeming inequity" that arises from the majority's well-reasoned application of *Teague*.<sup>12</sup> Castille further predicted that it may "require a constitutional decision as innovative as *Miller* itself to divine an existing Eighth Amendment basis for holding that *Miller* is to be afforded retroactive effect."<sup>13</sup>

Only the federal courts are required to follow the *Teague* standard.<sup>14</sup> Given the difficulty courts have encountered in reaching a consensus on the substantive vs. procedural debate, *Miller*'s holding can be seen as an invitation to the States to experiment with alternatives to *Teague*. Criminal defense attorney Ezra Landes has offered one such alternative to *Teague*'s exception for "watershed" procedural rules that promises to afford new rules greater potential for retroactive application.<sup>15</sup> Under Landes' "line of cases" approach, a new procedural rule is

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<sup>6</sup> *Teague v. Lane*, 489 U.S. 288, 311 (1989).

<sup>7</sup> See Ezra D. Landes, *A New Approach to Overcoming the Insurmountable "Watershed Rule" Exception to Teague's Collateral Review Killer*, 74 Mo. L. REV. 1, 11–12 (2009).

<sup>8</sup> It is worth noting that, at the time of this writing, the Florida Supreme Court has heard oral argument on the issue of *Miller*'s retroactivity, but has not yet issued an opinion. See *Falcon v. State*, No. SC13-865, 2013 WL 6978507, at \*1 (Fla. June 3, 2013). However, Florida uses a different retroactivity standard than *Teague*, which is the focus of this article, and so it is unlikely that this case's disposition will have any material effect on this article. Additionally, the Texas Court of Criminal Appeals has held that *Miller* applies retroactively as a substantive rule. See *Ex parte Maxwell*, No. AP-76964, 2014 WL 941675, at \*4 (Tex. Crim. App. Mar. 12, 2014). Though not the highest court in Texas, criminal cases rarely proceed to the Texas Supreme Court.

<sup>9</sup> *In re Morgan*, 713 F.3d 1365, 1369 (11th Cir. 2013) (Wilson, J., concurring).

<sup>10</sup> *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014).

<sup>11</sup> *Commonwealth v. Cunningham*, 81 A.3d 1, 7–9 (Pa. 2013).

<sup>12</sup> *Id.* at 11 (Castille, J., concurring).

<sup>13</sup> *Id.* at 12.

<sup>14</sup> *Danforth v. Minnesota*, 552 U.S. 264, 280–81 (2008).

<sup>15</sup> See Landes, *supra* note 7, at 16.

applied retroactively not only if it is a “watershed” rule of criminal procedure on its own, but also if it establishes a “watershed” rule when taken together with other cases.<sup>16</sup> In short, Landes’ approach to procedural rules also focuses on the significance of the forest, rather than limiting itself to the significance of each individual tree.

This article seeks to establish that *Miller v. Alabama*, when taken together with the other recent Supreme Court cases *Roper v. Simmons*, *Graham v. Florida*, and *J.D.B. v. North Carolina*, creates a watershed rule that “kids are different” and must be treated differently throughout the criminal trial process. Because *Miller* belongs to this watershed line of cases, it merits retroactive application. Part II explains the *Teague* retroactivity doctrine. Part III of this article examines the evolution of the “kids are different” rule and how *Miller v. Alabama* fits within that rule. Part IV analyzes how *Teague* has been applied to *Miller* by the eleven state supreme courts.<sup>17</sup> Part V discusses the “line of cases” alternative and how it would produce more accurate and consistent results than the current *Teague* standard as applied to *Miller v. Alabama*. Part VI concludes the article.

## II. THE *TEAGUE* RETROACTIVITY STANDARD

In *Teague v. Lane*, the Supreme Court adopted its current standard for determining whether new rules of criminal procedure are to be given retroactive effect, based primarily on Justice Harlan’s concurrence in *Mackey v. United States*.<sup>18</sup> The Supreme Court felt the need to adopt a new retroactivity standard in light of the “more than mildly negative” response to the inconsistencies and inequalities created by the *Linkletter* standard that it had previously employed to answer questions of retroactivity.<sup>19</sup> The *Linkletter* standard required the Court to analyze three factors in determining whether to apply a new rule retroactively: (1)

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<sup>16</sup> *Id.*

<sup>17</sup> This article specifically focuses on state courts because, unlike the federal courts, they are not bound to follow *Teague*. *Danforth*, 552 U.S. at 280–81. Because the article is targeted at state courts, the discussion of how *Teague* has been applied to *Miller* thus far is mostly limited to state, rather than federal, court opinions.

<sup>18</sup> *Teague v. Lane*, 489 U.S. 288, 307 (1989). Prior to adopting *Teague*, the Supreme Court employed the *Linkletter* standard for determining whether new rules of criminal procedure would receive retroactive application. *Linkletter v. Walker*, 381 U.S. 618 (1965). Shortly before *Teague* was decided, the Supreme Court had abandoned the use of the *Linkletter* standard for cases pending direct review. *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). The Supreme Court found Justice Harlan’s opinions in *Mackey* and *Desist* persuasive in deciding to distinguish between cases that had already received a final disposition from those that were pending direct review at the time a new rule was announced in a retroactivity analysis. *Id.* at 321–22. When the Supreme Court revamped its retroactivity analysis for final cases in *Teague* two years later, it again referred to Justice Harlan’s opinions in *Mackey* and *Desist* for guidance. *Teague*, 489 U.S. at 302–04.

<sup>19</sup> *Teague*, 489 U.S. at 303.

the purpose served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice.<sup>20</sup>

The *Teague* standard presumes that “new rules generally should not be applied retroactively to cases on collateral review.”<sup>21</sup> The Supreme Court defines a “new rule” as one that was “not dictated by precedent existing at the time the defendant’s conviction became final.”<sup>22</sup> Two minor exceptions are carved out of *Teague*’s general presumption of nonretroactivity for new rules that either place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”<sup>23</sup> or require “the observance of ‘those procedures that . . . are ‘implicit in the concept of ordered liberty.’”<sup>24</sup> The Supreme Court’s interpretation of Justice Harlan’s concurrence in *Mackey* was that it specifically reserved the second exception for watershed rules of criminal procedure that “alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.”<sup>25</sup> The Supreme Court further narrowed the second exception by limiting its scope to “those new procedures without which the likelihood of an accurate conviction is seriously diminished,” in accordance with Justice Harlan’s dissent in *Desist v. United States*.<sup>26</sup>

Naturally, the *Teague* opinion served as a catalyst for quite a bit of litigation over exactly which rules of criminal procedure would fall within its two exceptions. In *Bousley v. United States*, the Supreme Court first acknowledged the significance of distinguishing between substantive and procedural rules in a *Teague* retroactivity analysis.<sup>27</sup> Procedural rules are only retroactive under *Teague* if their absence produces a serious risk that the innocent will be convicted.<sup>28</sup> Substantive rules necessarily carry this risk because they recognize that a criminal statute does not reach certain conduct,<sup>29</sup> therefore, they are generally applied retroactively under *Teague*.<sup>30</sup>

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<sup>20</sup> *Linkletter*, 381 U.S. at 636.

<sup>21</sup> *Teague*, 489 U.S. at 305.

<sup>22</sup> *Id.* at 301 (emphasis omitted) (citation omitted).

<sup>23</sup> *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)).

<sup>24</sup> *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>25</sup> *Id.* at 311 (quoting *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring)) (emphasis omitted).

<sup>26</sup> *Id.* at 313, *construed in* *Desist v. United States*, 394 U.S. 244, 262 (1969).

<sup>27</sup> *Bousley v. United States*, 523 U.S. 614, 620 (1998).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Schiro v. Summerlin*, 542 U.S. 348, 351–52 (2004).

In *Danforth v. Minnesota*, the Supreme Court established that only the federal courts are required to use *Teague*.<sup>31</sup> The *Danforth* Court found that *Teague*'s general "rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings."<sup>32</sup> State courts, however, are free to give retroactive effect to cases that are deemed "nonretroactive" under the *Teague* standard.<sup>33</sup> The Court acknowledged that it had adopted *Teague* in response to the inconsistent results produced by the *Linkletter* approach, but maintained that "[n]onuniformity is, in fact, an unavoidable reality in a federalist system of government."<sup>34</sup> Although the Supreme Court has renounced *Linkletter*, some state courts, such as in Florida and Michigan, still incorporate it into their own retroactivity analysis to give new rules broader retroactive effect.<sup>35</sup>

### III. KIDS ARE DIFFERENT: AN EVOLVING CONSTITUTIONAL RULE

#### A. The "Death is Different" Principle as Primogenitor

State legislatures are generally entrusted with great deference to fashion appropriate penalties for criminal behavior.<sup>36</sup> The Eighth Amendment's ban on cruel and unusual punishment prohibits only "extreme sentences that are 'grossly disproportionate' to the crime."<sup>37</sup> Death is different. Because the death penalty is unique in its severity and irrevocability, the Supreme Court has placed restrictions on its imposition, including the procedures permissible to impose it, the offenses for which it can be imposed, and the offenders upon whom it can be imposed.

In *Roper v. Simmons*, the Supreme Court relied on the "death is different" principle to prohibit the imposition of the death penalty on juvenile offenders.<sup>38</sup> The Court found that the "objective indicia of consensus" among the States had changed regarding the imposition of the death penalty on juveniles since it issued the exact opposite holding in *Stanford v. Kentucky* sixteen years earlier.<sup>39</sup> The Court could simply have adopted the predominant State practice, but instead it went further and held that juveniles have a diminished culpability as compared to adults, meaning that they could not be classified among the worst of the worst

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<sup>31</sup> *Danforth v. Minnesota*, 552 U.S. 264, 277 (2008).

<sup>32</sup> *Id.* at 280.

<sup>33</sup> *Id.* at 280–82.

<sup>34</sup> *Id.* at 280.

<sup>35</sup> See *Witt v. State*, 387 So. 2d 922, 929 & n.25 (Fla. 1980); *People v. Maxson*, 759 N.W.2d 817, 822 (Mich. 2008).

<sup>36</sup> *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

<sup>37</sup> *Id.* at 1001 (quoting *Solem v. Helm*, 463 U.S. 277, 288, 303 (1983)).

<sup>38</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

<sup>39</sup> *Id.* at 574. Sixteen years prior to *Roper*, the Supreme Court held that the Eighth Amendment does not prohibit the imposition of the death penalty on juveniles. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

offenders deserving of the death penalty.<sup>40</sup> In support of its holding, the Court relied on scientific data establishing that children are different from adults in three important ways: (1) “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young,” (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures [than adults],” and (3) “the character of a juvenile is not as well formed as that of an adult.”<sup>41</sup> As to that third point, the Supreme Court elaborated that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>42</sup>

The *Roper* Court found that a categorical prohibition on the death penalty for juveniles was necessary, rather than simply requiring a sentencer to take a defendant’s youthfulness into account, because “[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course.”<sup>43</sup> In fact, the Court was concerned that “[i]n some cases, a defendant’s youth may even be counted against him.”<sup>44</sup> So, *Roper v. Simmons* broke from the Supreme Court’s earlier holding in *Stanford v. Kentucky* as more than a mere acknowledgement that the States had begun to change their practices regarding the juvenile death penalty. *Roper* established that “kids are different” from adults in three fundamental ways and that these differences warrant categorically different treatment by a sentencing authority.

In 2010, the Supreme Court issued *Graham v. Florida*, which broke open the “death is different” barrier by utilizing a categorical analysis to find that sentences of life without parole are unconstitutional as applied to juvenile offenders convicted of non-homicide offenses.<sup>45</sup> *Graham* relied on much of the same scientific data that the Court used in *Roper*, finding that advancements in neuroscience had reinforced earlier findings from psychology and social science by producing evidence that “parts of the brain involved in behavior continue to mature through late adolescence.”<sup>46</sup> Therefore, “[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character.’”<sup>47</sup>

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<sup>40</sup> *Roper*, 543 U.S. at 570.

<sup>41</sup> *Id.* at 569–70.

<sup>42</sup> *Id.* at 573.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *Graham v. Florida*, 560 U.S. 48, 61–62 (2010).

<sup>46</sup> *Id.* at 68.

<sup>47</sup> *Id.* (quoting *Roper*, 543 U.S. at 570).

As in *Roper*, the *Graham* Court found that a categorical prohibition on life without parole was necessary due to concerns over whether “courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.”<sup>48</sup> Additionally, the Court expressed concern that the defining characteristics of youth make juveniles more difficult to adequately represent throughout the trial process and that a case-by-case approach would inadvertently result in greater punishment for juveniles because of these difficulties.<sup>49</sup> Therefore, the Supreme Court held that the State must provide a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” to all juveniles convicted of non-homicide offenses who are serving life sentences.<sup>50</sup>

Due to both its unprecedented imposition of a categorical ban on a noncapital sentencing scheme and its focus on the defining characteristics of juveniles, *Graham*’s holding quickly came to be understood as more than a mere extension of the “death is different” principle. *Graham*’s requirement that the State provide a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” can be seen as establishing a right to rehabilitation for juveniles.<sup>51</sup> *Graham* expanded on the framework built in *Roper* by emphasizing that the fundamental differences between children and adults make children more prone to rehabilitation and have implications on the criminal trial process. While *Roper* may be seen as a mere extension of the “death is different” principle, *Graham* stood for a new constitutional principle that “kids are different” and must be treated differently by the criminal justice system.<sup>52</sup>

#### B. The “Kids are Different” Principle Takes Root

A year after *Graham*, the Supreme Court decided *J.D.B. v. North Carolina*, which required a judge to consider a juvenile defendant’s age when evaluating whether he or she was in custody for *Miranda* purposes.<sup>53</sup> Again, science motivated the Court, as it expressed concern over studies illustrating the

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<sup>48</sup> *Id.* at 77.

<sup>49</sup> *Id.* at 78–79.

<sup>50</sup> *Id.* at 75.

<sup>51</sup> See Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 103 (2010).

<sup>52</sup> See Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 463 (2012) (citing Arya, *supra* note 51, at 99); Ioana Tchoukleva, *Children Are Different: Bridging the Gap between Rhetoric and Reality Post Miller v. Alabama*, 4 CALIF. L. REV. CIRCUIT 92, 94 (2013). But see William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109 (2010) (arguing that *Graham* is an extension of the “death is different” principle to life without parole sentences, rather than a new categorical rule for juveniles).

<sup>53</sup> *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2399 (2011).

heightened risk of false confessions from youths.<sup>54</sup> Though departing from the realm of sentencing, the Court relied on much of the same rationale that animated its earlier rulings in *Graham* and *Roper*, including the three fundamental differences between juveniles and adults.<sup>55</sup> By the time it decided *J.D.B.*, the Court regarded the “kids are different” principle as a matter of common sense, stating that “[s]uch conclusions [about juvenile behavior and perception] apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.”<sup>56</sup> In fact, the Court went so far as to say that “in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect’s age.”<sup>57</sup>

*J.D.B.* is aimed squarely at improving the accuracy of a criminal trial by ensuring that one of the State’s key pieces of evidence—a confession—is not tainted by a juvenile suspect’s inherent inability to understand his or her surroundings and exercise mature judgment.<sup>58</sup> Though youthfulness will not be a significant factor in every custody determination, to ignore it would be “to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.”<sup>59</sup> The Supreme Court’s application of “kids are different” to pretrial custody determinations in *J.D.B.* establishes that this rule extends far beyond sentencing.<sup>60</sup>

In 2012, the Supreme Court finally pronounced in *Miller v. Alabama* that “if (as *Harmelin* recognized) ‘death is different,’ children are different too.”<sup>61</sup> This landmark decision dispelled any possibility that *Graham*’s holding was a mere deviation from the “death is different” mold. Building off the scientific evidence that it had used in *Roper* and *Graham*, the Court made it clear that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”<sup>62</sup> The Court not only prohibited the states from imposing mandatory sentences of life without parole on juveniles convicted of homicide offenses, but also cautioned that “given all we have said in *Roper*, *Graham*, and this decision about children’s diminished

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<sup>54</sup> *Id.* at 2401.

<sup>55</sup> *Id.* at 2403.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2405.

<sup>58</sup> *Id.* at 2403.

<sup>59</sup> *Id.* at 2408.

<sup>60</sup> See Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 517 (2012) (arguing that the “reasonable juvenile” standard employed by the Supreme Court in *J.D.B.* opens the door for consideration of the unique attributes of youth in other criminal law contexts).

<sup>61</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012).

<sup>62</sup> *Id.* at 2465.



culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”<sup>63</sup> The Court stopped short of imposing a categorical ban as it had in *Roper* and *Graham*, finding instead that its holding was sufficient to resolve *Miller* and its companion case, *Jackson v. Hobbs*.<sup>64</sup>

As in *Graham*, the *Miller* Court also took issue with the inability of the mandatory sentencing schemes to account for ways in which the distinguishing characteristics of youth may influence the criminal trial process itself.<sup>65</sup> The Court stated that a sentencing court needs to consider a juvenile’s “inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.”<sup>66</sup> So, *Miller* establishes not only that “kids are different” for the purpose of sentencing, but also that their differences affect the fairness of the criminal trial process itself.

*Miller v. Alabama* is the latest Supreme Court case in the “kids are different” line. But, some state courts have embraced this emerging constitutional principle and further expanded on it. Most prominently, the Iowa Supreme Court released its own trilogy of juvenile sentencing cases—*Null*, *Ragland*, and *Pearson*—on August 16, 2013.<sup>67</sup> While *Null* and *Ragland* address issues related directly to the implementation of *Miller*, *Pearson* advances the “kids are different” principle well beyond what the Supreme Court has mandated thus far. *Pearson* had been sentenced to a term of fifty years with parole eligibility after thirty-five years for a series of armed robberies she had participated in as a juvenile.<sup>68</sup> Acknowledging that *Miller* specifically addressed only juvenile offenders who received life without parole sentences for homicide offenses, the *Pearson* court held that “its reasoning applies equally to *Pearson*’s sentence of thirty-five years without the possibility of parole for these [non-homicide] offenses.”<sup>69</sup> The court found that *Pearson*’s lengthy sentence violated the Eighth Amendment because “the district court emphasized the nature of the crimes to the exclusion of the mitigating features of youth.”<sup>70</sup> Holding otherwise, the court feared, “would be ignoring the teaching of

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<sup>63</sup> *Id.* at 2469.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2468.

<sup>66</sup> *Id.*

<sup>67</sup> *State v. Null*, 836 N.W.2d 41, 72–75 (Iowa 2013) (holding that *Miller* protections are triggered when a juvenile is sentenced to a lengthy term-of-years that guarantees either life in prison or geriatric release and providing guidance on what the trial court must do to comply with *Miller*); *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (holding that *Miller* requires that the trial court consider the mitigating features of youth before imposing a lengthy sentence on a juvenile offender convicted of certain offenses); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013) (holding that *Miller* applies retroactively as a substantive rule under *Teague*).

<sup>68</sup> *Pearson*, 836 N.W.2d at 89.

<sup>69</sup> *Id.* at 96.

<sup>70</sup> *Id.* at 97.

the *Roper-Graham-Miller* line of cases that juveniles have less culpability than adults, that the few youths who are irredeemable are difficult to identify, and that juveniles have rehabilitation potential exceeding that of adults.”<sup>71</sup> Importantly, the Iowa Supreme Court repeatedly framed its holding as guided by the “principles underlying *Miller*” or “the *Roper-Graham-Miller* line of cases,” rather than by *Miller* alone.<sup>72</sup>

#### IV. *TEAGUE* AS APPLIED TO *MILLER V. ALABAMA*

Eleven state supreme courts have tackled the retroactivity question presented by *Miller*, and all eleven have used *Teague*.<sup>73</sup> The substantive vs. procedural debate has thus far been dispositive of whether a state court applies *Miller* retroactively, with six states finding that *Miller* is a substantive rule that applies retroactively, four finding that it is a procedural rule that does not, and one state finding that *Miller* contains both substantive and procedural aspects and applies retroactively because it is more substantive than procedural. Indeed, the *Miller* opinion itself left the states with mixed signals on whether it is substantive or procedural.<sup>74</sup>

In *Miller*, the Supreme Court stated that “[o]ur decision does not categorically bar a penalty . . . . [i]nstead, it mandates only that a sentencer follow a certain process . . . before imposing a particular penalty.”<sup>75</sup> On its face, this quote places *Miller* squarely within the procedural category, meaning that it only applies retroactively if it is deemed “watershed.” However, *Miller v. Alabama* differs significantly from other procedural rules, such as those announced in *Apprendi*<sup>76</sup> and *Ring*,<sup>77</sup> in that *Miller* does not simply tweak an existing fact-finding process,

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<sup>71</sup> *Id.* at 96.

<sup>72</sup> *Id.* at 95–98.

<sup>73</sup> See *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014); *State v. Ragland*, 836 N.W.2d 107, 114, 117 (Iowa 2013); *State v. Tate*, 130 So. 3d 829, 834 (La. 2013); *Diatchenko v. Dist. Att’y*, 1 N.E.3d 270, 278 (Mass. 2013); *People v. Carp*, 852 N.W.2d 801, 818–41; *Chambers v. State*, 831 N.W.2d 311, 324 (Minn. 2013); *Jones v. State*, 122 So. 3d 698, 701 (Miss. 2013); *State v. Mantich*, 842 N.W.2d 716, 724 (Neb. 2014); *Petition of State*, No. 2013-566, 2014 WL 4253359, at \*4–5 (N.H. 2014); *Commonwealth v. Cunningham*, 81 A.3d 1, 8 (Pa. 2013); *State v. Mares*, 335 P.3d 487, 507–08 (Wyo. 2014).

<sup>74</sup> It appears that the United States Supreme Court will not be providing the States with any more guidance as to *Miller*’s retroactivity within the next term, since it denied *certiorari* petitions in two of the state supreme court cases. See *Tate v. Louisiana*, 134 S. Ct. 2663, 2663 (2014); *Cunningham v. Pennsylvania*, 134 S. Ct. 2724, 2724 (2014).

<sup>75</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012).

<sup>76</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any fact, other than the fact of a prior conviction, “that increases the penalty for [a] crime above the statutory maximum must be submitted to the jury, and prove[d] beyond a reasonable doubt”).

<sup>77</sup> *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that aggravating factors, necessary to impose the death penalty, must be found by a jury rather than a judge).

but rather requires the creation of a fact-finding process where none existed before. Further, given the Supreme Court's admonition that life without parole should be reserved for that "rare juvenile offender whose crime reflects irreparable corruption,"<sup>78</sup> it is undeniable that *Miller v. Alabama* will function as an outright prohibition on life without parole for the vast majority of juvenile offenders. Finally, some courts have noted that it simply seems unfair to deny application of *Miller*'s holding to certain children based solely on the timing of their offense.<sup>79</sup>

This article proceeds to analyze each of the state supreme court opinions regarding the retroactive application of *Miller* in three parts: (1) those States that have found *Miller* to be a substantive rule, (2) those that have found *Miller* to be procedural, and (3) Nebraska, which put *Miller* somewhere in between.

#### A. *Miller is a Substantive Rule*

Mississippi was the first state to give *Miller v. Alabama* retroactive effect in *Jones v. State*.<sup>80</sup> Using a *Teague* analysis, the *Jones* Court held that *Miller* is a substantive rule of criminal procedure.<sup>81</sup> For Mississippi, the inquiry was simple: *Miller* is a substantive rule because it narrowed the scope of the existing punishment statute in Mississippi in that the existing "sentencing scheme may be applied to juveniles only after applicable *Miller* characteristics and circumstances have been considered by the sentencing authority. As such, *Miller* modified [Mississippi's] substantive law by narrowing its application for juveniles."<sup>82</sup> Iowa followed in *State v. Ragland*, predicated its holding on a broader set of rationales than Mississippi did.<sup>83</sup> Though it found that the practical effect of *Miller* was the creation of a new sentencing procedure, the *Ragland* Court also found that at the root of this process was a substantive ban on a certain form of punishment for a certain class of offenders.<sup>84</sup> Illinois repeated this characterization of *Miller* in *People v. Davis*, holding that it applies retroactively.<sup>85</sup> Similarly, Iowa's analysis guided New Hampshire and Wyoming in their respective decisions holding that *Miller* applies retroactively.<sup>86</sup> Iowa also emphasized that the two strands of precedent that *Miller* is based on—the categorical bans on specific penalties for

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<sup>78</sup> *Miller*, 132 S. Ct. at 2469.

<sup>79</sup> See *Commonwealth v. Cunningham*, 81 A.3d 1, 11 (Pa. 2013) (Castille, C.J., concurring); *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at \*3 (E.D. Mich. 2013).

<sup>80</sup> 122 So. 3d 698, 703 (Miss. 2013).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 702.

<sup>83</sup> 836 N.W.2d 107, 117 (Iowa 2013).

<sup>84</sup> *Id.* at 115–16.

<sup>85</sup> 6 N.E.3d 709, 722 (Ill. 2014).

<sup>86</sup> *Petition of State*, No. 2013-566, 2014 WL 4253359, at \*4–5 (N.H. 2014); *State v. Mares*, 335 P.3d 487, 507–08 (Wyo. 2014).

certain offenders and the cases requiring individualized sentencing before imposition of the death penalty—had all been applied retroactively.<sup>87</sup> Massachusetts also found that *Miller* applies retroactively in *Diatchenko v. District Attorney*, but, unlike in the other States, the Massachusetts Supreme Court remedied *Miller* by enacting a categorical ban on sentencing juveniles to life without parole.<sup>88</sup>

With the exception of Massachusetts,<sup>89</sup> the States that found *Miller* to be a substantive rule regarded mandatory life without parole sentences as more severe penalties than discretionary life without parole sentences. So, by requiring the States to implement a certain procedure, the Supreme Court did invoke a substantive ban on a distinct penalty on juveniles—*mandatory* life without parole.<sup>90</sup> Therefore, the fact that Mississippi, Iowa, and Illinois had to expand the range of possible penalties for juveniles convicted of homicide was sufficient to render *Miller* a substantive change in the law, even though no categorical ban on life without parole was imposed.<sup>91</sup>

#### B. *Miller* is a Procedural Rule Lacking Significance to Merit Retroactive Application

In *Chambers v. State*, Minnesota became the first state to reject retroactive application of *Miller* under the *Teague* standard.<sup>92</sup> The Minnesota Court classified *Miller* as a procedural rule because it did not announce a new element that must be proven before the State can impose a sentence of life without parole on a juvenile; rather, it simply “altered the permissible methods by which the State can exercise its continuing power to punish juvenile homicide offenders by life imprisonment without the possibility of parole.”<sup>93</sup> Before considering whether *Miller v. Alabama* is a “watershed rule of criminal procedure,” the Court stressed just how narrow this class of rules is, emphasizing that the “rule must both be “necessary to prevent an impermissibly large risk of inaccurate conviction” [and must] “alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding.””<sup>94</sup> Minnesota then concluded that *Miller* is not a “watershed rule” because it affects only the juvenile’s sentence and not the underlying conviction,

<sup>87</sup> *Ragland*, 836 N.W.2d at 116.

<sup>88</sup> 1 N.E.3d 270, 286–87 (Mass. 2013).

<sup>89</sup> As noted, *Miller* actually did operate as a categorical ban on juvenile life without parole in Massachusetts. *Id.*

<sup>90</sup> *Davis*, 6 N.E.3d at 722–23; *Ragland*, 836 N.W.2d at 115–16.

<sup>91</sup> *Davis*, 6 N.E.3d at 722–23; *Ragland*, 836 N.W.2d at 115; *Jones v. State*, 122 So. 3d 698, 702 (Miss. 2013).

<sup>92</sup> 831 N.W.2d 311, 328 (Minn. 2013).

<sup>93</sup> *Id.* at 328–30.

<sup>94</sup> *Id.* at 330 (citing *Campos v. State*, 816 N.W.2d 480, 498 (Minn. 2012)).

and because there are numerous other cases establishing a right to present mitigating evidence at sentencing.<sup>95</sup> Pennsylvania and Louisiana essentially reiterated Minnesota's retroactivity analysis in holding that *Miller* is not retroactive.<sup>96</sup>

*Commonwealth v. Cunningham*, the Pennsylvania case finding that *Miller* does not apply retroactively, does contain one interesting distinction in that the Pennsylvania Supreme Court began its analysis by criticizing the *Teague* standard, noting that it "is not necessarily a natural model for retroactivity jurisprudence as applied at the state level."<sup>97</sup> However, since neither party proposed an alternative to *Teague*, the *Cunningham* Court felt bound to follow it.<sup>98</sup> Likewise, in *People v. Carp*, the Michigan Supreme Court applied both the *Teague* retroactivity standard and its own state standard, which incorporates the *Linkletter* factors.<sup>99</sup> After concluding that *Miller* is a procedural rule that does not merit retroactive application under *Teague*, Michigan found that *Miller* fares no better with the *Linkletter* factors because it affects the juvenile's sentence rather than the underlying conviction.<sup>100</sup> The Michigan Court's understanding of *Linkletter* was that only rules implicating the determination of guilt or innocence favor retroactive application under *Linkletter*'s first and most important factor—the purpose of the rule.<sup>101</sup> The Michigan Court further stated that the latter two *Linkletter* factors—the extent of reliance on the old rule and the effect on the administration of justice—also weighed against retroactive application.<sup>102</sup>

The States that found *Miller* to be a procedural rule did not consider a mandatory sentence of life without parole to be any more severe than a discretionary sentence of life without parole. So, in their view, *Miller* simply required States to change the means in which they imposed the exact same penalty that they had already been imposing.<sup>103</sup> Further, these States all agreed that *Miller* would need to clear two hurdles in order to be considered a "watershed" rule of criminal procedure.<sup>104</sup> The first of these hurdles was the effect that *Miller* would have on the underlying conviction.<sup>105</sup> The second was whether *Miller* alters the

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<sup>95</sup> *Id.*

<sup>96</sup> See *State v. Tate*, 130 So. 3d 829, 839–41 (La. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013).

<sup>97</sup> 81 A.3d at 8.

<sup>98</sup> *Id.* at 8–9.

<sup>99</sup> 852 N.W.2d 801, 818–41 (Mich. 2014).

<sup>100</sup> *Id.* at 832–41.

<sup>101</sup> *Id.* at 833–35.

<sup>102</sup> *Id.* at 837.

<sup>103</sup> *State v. Tate*, 130 So. 3d 829, 837–38 (La. 2013); *Chambers v. State*, 831 N.W.2d 311, 328–30 (Minn. 2013); *Cunningham*, 81 A.3d at 10.

<sup>104</sup> *Tate*, 130 So. 3d at 839–40; *Chambers*, 831 N.W.2d at 330; *Cunningham*, 81 A.3d at 10.

<sup>105</sup> *Chambers*, 831 N.W.2d at 330.

understanding of “bedrock procedural elements essential to the fairness of the proceeding.”<sup>106</sup> No State found that *Miller* met these two requirements, and so it has not yet been applied retroactively as a procedural rule.

C. *The Mantich Opinion: Miller is Somewhere in between Substantive and Procedural*

Most recently, in *State v. Mantich*, the Nebraska Supreme Court applied *Miller* retroactively.<sup>107</sup> Nebraska surveyed the responses of other state and federal courts and found that *Miller* embodied both procedural and substantive components.<sup>108</sup> As did the other “substantive” states, the *Mantich* Court took into account the effect that *Miller* had on Nebraska’s substantive law and the United States Supreme Court’s application of *Miller*’s holding to *Jackson v. Hobbs* and concluded that *Miller* applies retroactively.<sup>109</sup> But, ultimately, “it is the absence of . . . choice that makes the *Miller* rule more substantive than procedural.”<sup>110</sup> Although Nebraska agreed “that the *Miller* rule is entirely substantive when viewed as Massachusetts, Mississippi, and Illinois have,” it did not go so far as to declare that *Miller* is in fact a substantive rule, only that it is “more substantive than procedural.”<sup>111</sup>

Nebraska’s analysis is likely the most honest of any that have been undertaken thus far. The “substantive” States have all had to reconcile their holdings with the fact that *Miller* plainly states that “it mandates only that a sentencer follow a certain process . . . before imposing a particular penalty.”<sup>112</sup> Likewise, the “procedural” States have had to diminish the relevance of *Jackson v. Hobbs* and both strands of cases leading up to *Miller*,<sup>113</sup> while also ignoring the fact that they do have to come up with some new penalties as an alternative for juveniles convicted of homicide, but not sentenced to life without parole. Nebraska avoided this situation by acknowledging that *Miller* possesses both substantive and procedural aspects and placing *Miller* on the substantive side of the continuum.<sup>114</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> 842 N.W.2d 716, 731 (Neb. 2014).

<sup>108</sup> *Id.* at 726–30.

<sup>109</sup> *Id.* at 730–31.

<sup>110</sup> *Id.* at 731.

<sup>111</sup> *Id.*

<sup>112</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012).

<sup>113</sup> *Commonwealth v. Cunningham*, 81 A.3d 1, 9 (Pa. 2013).

<sup>114</sup> *Mantich*, 842 N.W.2d at 729–31.

V. AN ALTERNATIVE APPROACH: *TEAGUE* AS APPLIED TO THE “KIDS ARE DIFFERENT” LINE OF CASES

Eight states have addressed the issue of whether *Miller v. Alabama* applies retroactively and a consensus has yet to emerge. As the Nebraska Supreme Court discussed, this is likely because *Miller* is neither purely substantive nor purely procedural.<sup>115</sup> A rule this evasive of classification may simply be the product of the Supreme Court’s minimalist inclinations.<sup>116</sup> In *Miller*, the Supreme Court stopped short of imposing a categorical ban on life without parole for all juveniles, because the “holding [was] sufficient to decide [*Miller* and *Jackson*].”<sup>117</sup> But, as Professor Berkheiser has noted, when predictability is important, “the narrowness of minimalism ‘can be a big mistake.’”<sup>118</sup> Professor Berkheiser expressed concern over the predictability of what length of sentences juveniles affected by *Miller* might receive,<sup>119</sup> but *Miller* has yielded unpredictable results with the even more rudimentary issue of which juveniles it actually applies to. Ezra Landes also spoke of judicial minimalism as necessitating the “line of cases” modification to *Teague*, since “[t]his Court’s commitment to narrowness means that we are unlikely to ever see a revolutionary Warren Court style holding like a *Gideon* (or a *Mapp* or a *Miranda*), which in turn augurs ill for the watershed rule exception ever being satisfied under the current regime.”<sup>120</sup> *Teague* reserves retroactive application for “watershed rules of criminal procedure,” but States implementing a minimalist Supreme Court’s holdings need a standard by which incremental, yet important, changes in the law can receive retroactive effect. The “line of cases” approach is a simple modification to the existing *Teague* standard, which promises more accurate and fair retroactive application of the incremental procedural rules that are consistent with the current Supreme Court’s judicial philosophy.

A state court applying a modified *Teague* standard to *Miller v. Alabama* would begin in the same way that courts applying *Teague* currently do. The first inquiry would be whether or not *Miller* announces a new rule.<sup>121</sup> Finding that *Miller* does announce a new rule, the court would then ask whether *Miller* is a substantive or a procedural rule. Some courts, especially those in states like Massachusetts that have abolished life without parole for juveniles as a response to

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<sup>115</sup> See *id.* at 729.

<sup>116</sup> Mary Berkheiser, *Developmental Detour: How the Minimalism of Miller v. Alabama Led the Court’s “Kids are Different” Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489, 514–15 (2013).

<sup>117</sup> *Miller*, 132 S. Ct. at 2469.

<sup>118</sup> Berkheiser, *supra* note 116, at 517 (quoting Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1909–10 (2006)).

<sup>119</sup> *Id.*

<sup>120</sup> Landes, *supra* note 7, at 18.

<sup>121</sup> As the Nebraska Supreme Court noted “[i]t is very clear that *Miller* announced a new rule.” *State v. Mantich*, 842 N.W.2d 716, 724 (Neb. 2014).

*Miller*, may conclude that *Miller* is substantive. However, others will not, and will move on to the next stage of the inquiry, which is whether *Miller* is a “watershed” rule of criminal procedure. Most state courts will likely follow the example set by the other procedural states and declare that *Miller* is not a “watershed rule,” which ends the inquiry under *Teague*.<sup>122</sup> But, using a modified *Teague* standard, a state court would then ask whether *Miller* belongs to a “line of cases.” Given the depth at which the Supreme Court discussed *Roper* and *Graham* in the *Miller* opinion, state courts will likely conclude that *Miller* does belong to the “kids are different” line of cases.<sup>123</sup> So, the question becomes whether the “kids are different” line of cases is a “watershed rule.” As the Minnesota Court discussed in *Chambers*, in order for “kids are different” to reach watershed status it must (1) be necessary to prevent an impermissibly large risk of inaccurate conviction, and (2) alter the understanding of bedrock procedural elements essential to the fairness of the proceeding.<sup>124</sup>

#### A. The Effect of the “Kids are Different” Principle on the Accuracy of a Conviction

The procedural States have held that *Miller* does not prevent an impermissibly large risk of inaccurate conviction because it merely affects sentencing and not the underlying conviction.<sup>125</sup> “Kids are different,” on the other hand, includes *J.D.B. v. North Carolina*, which improves the accuracy of the criminal trial process by requiring a judge to determine whether one of the State’s most powerful pieces of evidence in any case—a confession—is too unreliable to be admissible due to the defendant’s youthfulness.<sup>126</sup> *J.D.B.* and other cases concerning the Fifth Amendment right against self-incrimination directly implicate the accuracy of the criminal trial because “the pressure of custodial interrogation is so immense that it ‘can induce a frighteningly high percentage of people to confess to crimes they never committed.’”<sup>127</sup> The risk of a false confession is further heightened with juveniles because they are even more prone to succumb to these pressures.<sup>128</sup>

The holdings of *Graham* and *Miller* specifically alter juvenile sentencing practices; in doing so, they address the ways in which juveniles are disadvantaged all throughout the criminal trial process.<sup>129</sup> In *Graham*, the Supreme Court listed

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<sup>122</sup> See *State v. Tate*, 130 So. 3d 829 (La. 2013); *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013).

<sup>123</sup> See *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>124</sup> *Chambers*, 831 N.W.2d at 330.

<sup>125</sup> *Id.*; *People v. Carp*, 852 N.W.2d 801, 834–35 (Mich. 2014).

<sup>126</sup> 131 S. Ct. 2394, 2403 (2011).

<sup>127</sup> *Id.* at 2401 (quoting *Corley v. United States*, 556 U.S. 303, 321 (2009)).

<sup>128</sup> *Id.*

<sup>129</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012); *Graham v. Florida*, 560 U.S. 48, 78 (2010).



the fact that “the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings” as a justification for imposing a categorical ban on life without parole sentences for juveniles convicted of non-homicide offenses.<sup>130</sup> The *Graham* Court went on to say that “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.”<sup>131</sup> In *Miller*, the Supreme Court similarly pointed out that a sentencing scheme that mandates life without parole for juveniles convicted of certain offenses “ignores that [the defendant] might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.”<sup>132</sup> So, while *Graham* and *Miller* may only require a state to change its sentencing practices as applied to juveniles, they do so, in part, as a safeguard against disproportionate punishment for juveniles whose immaturity caused them to be convicted of a more serious offense than an adult would have been. Therefore, a state court could easily conclude that the “kids are different” principle is necessary to prevent inaccurate convictions.

*B. Whether the “Kids are Different” Principle Alters the Understanding of Bedrock Procedural Elements Essential to the Fairness of the Proceeding.*

The procedural states have rejected the claim that *Miller* alters the understanding of bedrock procedural elements essential to the fairness of sentencing because there are numerous other cases establishing the importance of the ability to present mitigating evidence at sentencing.<sup>133</sup> But, a state employing a modified *Teague* standard would take a step back and ask whether the “kids are different” principle as a whole marks a shift in the law that alters the understanding of procedural fairness.

*Gideon v. Wainwright* is the only “watershed” rule of criminal procedure currently in existence under the *Teague* standard.<sup>134</sup> In issuing *Gideon*, the Court explicitly overturned *Betts v. Brady* decided only twenty years earlier, which held that the right to counsel was not a “fundamental right” to be incorporated on the States.<sup>135</sup> The *Gideon* Court stated that “*Betts* was ‘an anachronism when handed down’ and . . . should now be overruled.”<sup>136</sup> Similarly, when the Supreme Court

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<sup>130</sup> *Graham*, 560 U.S. at 78.

<sup>131</sup> *Id.*

<sup>132</sup> *Miller*, 132 S. Ct. at 2468.

<sup>133</sup> *State v. Tate*, 130 So. 3d 829, 840–41 (La. 2013); *Chambers v. State*, 831 N.W.2d 311, 330 (Minn. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013).

<sup>134</sup> *See Beard v. Banks*, 542 U.S. 406, 417–18 (2004).

<sup>135</sup> *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

<sup>136</sup> *Id.*

issued *Roper v. Simmons*, it explicitly overturned its ruling in *Stanford v. Kentucky* from only sixteen years earlier.<sup>137</sup> As *Gideon* broke from recent precedent, so too did *Roper* break from the existing precedent that altered the understanding of fairness regarding juveniles in the criminal justice system.

Additionally, the “kids are different” principle also refutes the legislative dogma from the past several decades of “adult time for adult crime.”<sup>138</sup> As Professor Guggenheim put it, “[l]egislatures, policy-makers, and courts ceased regarding children as mostly different from adults, and instead, for the first time since juvenile court came into being, began regarding children . . . as largely similar to adults.”<sup>139</sup> While *Miller* may simply extend the existing right to individualized sentencing that adults facing the death penalty already possess to juveniles confronting life without parole, it is part of a much broader shift in the law that reverses the trends that have characterized the criminal trial process as it applied to juveniles for decades. Therefore, a state court looking at the “kids are different” principle would likely find that it alters the understanding of procedural fairness, in that it requires states to do something they have refused to do for decades—treat children, even those accused of serious crimes, like children.

## VI. CONCLUSION

Eleven states have attempted to solve the *Miller* retroactivity puzzle using *Teague* and a consensus has yet to emerge.<sup>140</sup> The split among states assessing *Miller*’s retroactivity is exactly the kind of inconsistency that the Supreme Court sought to remedy by adopting *Teague*.<sup>141</sup> Although *Danforth* embraced federalism and nonuniformity among the States using their *own* standards for retroactivity,<sup>142</sup> the failure of the States to produce consistent results with the *same* standard points to a fundamental flaw with *Teague*—its inability to deal with rules that are “quasi-substantive.” States are under no obligation to use *Teague*,<sup>143</sup> and, as the Pennsylvania Supreme Court noted in *Cunningham*, the *Teague* standard “is not necessarily a natural model for retroactivity jurisprudence as applied at the state

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<sup>137</sup> *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

<sup>138</sup> See Guggenheim, *supra* note 52, at 473.

<sup>139</sup> *Id.*

<sup>140</sup> See *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014); *State v. Ragland*, 836 N.W.2d 107, 114, 117 (Iowa 2013); *State v. Tate*, 130 So. 3d 829, 834 (La. 2013); *Diatchenko v. Dist. Att’y*, 1 N.E.3d 270, 278 (Mass. 2013); *People v. Carp*, 852 N.W.2d 801, 818–41; *Chambers v. State*, 831 N.W.2d 311, 324 (Minn. 2013); *Jones v. State*, 122 So. 3d 698, 701 (Miss. 2013); *State v. Mantich*, 842 N.W.2d 716, 724 (Neb. 2014); *Petition of State*, No. 2013-566, 2014 WL 4253359, at \*4–5 (N.H. 2014); *Commonwealth v. Cunningham*, 81 A.3d 1, 8 (Pa. 2013); *State v. Mares*, 335 P.3d 487, 504 (Wyo. 2014).

<sup>141</sup> *Teague v. Lane*, 489 U.S. 288, 302–03 (1989).

<sup>142</sup> *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).

<sup>143</sup> *Id.* at 280–81.

level.”<sup>144</sup> So, *Miller v. Alabama* invites the States to experiment with some alternatives to *Teague*.

The modified *Teague* approach discussed in this article simply adds another two steps to the *Teague* analysis for procedural rules. After a state court has concluded that a procedural rule is not “watershed” on its own, the court would then ask whether the rule belongs to a cognizable line of cases and, if so, whether that line of cases establishes a watershed rule of criminal procedure. For *Miller*, the line of cases would be “kids are different.”<sup>145</sup> A state court analyzing “kids are different” would find that it is a watershed rule for two reasons. First, “kids are different” does a lot to guarantee that the conviction of a juvenile is accurate by taking into account how the factors of youth may implicate the trial process. Second, the “kids are different” rule breaks from the pre-existing jurisprudence and legislative sentiment regarding juveniles convicted of serious crimes and alters the understanding of procedural fairness with regard to juvenile offenders.

There are certainly flaws with a modified *Teague* approach. Some may argue that adding two steps to *Teague* will add even more complexity to an already convoluted analysis. But, any additional exception to *Teague*’s general rule of nonretroactivity aimed at “quasi-substantive” rules will carry the same degree of complexity. Others may argue that it is best to build on the Nebraska Supreme Court’s analysis of *Miller* in *Mantich* and view the substantive vs. procedural question as one of degree, rather than category.<sup>146</sup> But it can be just as subjective, if not more so, for courts to decide how “substantive” rules have to be before they apply retroactively as it is to decide whether rules are substantive or not. Finally, some may argue that the better approach is to follow the lead of states like Florida and Michigan, which incorporate the *Linkletter* factors into their own retroactivity analyses to give broader retroactive effect.<sup>147</sup> However, it seems contradictory to revert back to a standard that the Supreme Court has already declared to be unfair and inconsistent when trying to craft a fairer and more consistent retroactivity standard.<sup>148</sup> So, the “line of cases” *Teague* modification is an attractive option when compared to the alternatives in that it allows for retroactive application of important, yet incremental, changes in the law without doing much to disrupt the existing retroactivity jurisprudence.

As the Iowa Supreme Court stated in *Ragland*, at the root of this process mandated by *Miller* is a substantive ban on a certain form of punishment for a certain class of offenders.<sup>149</sup> Iowa’s interpretation sensed the forest behind the

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<sup>144</sup> *Cunningham*, 81 A.3d at 8.

<sup>145</sup> See *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

<sup>146</sup> See *State v. Mantich*, 842 N.W.2d 716, 732–33 (Neb. 2014) (Cassel, J., dissenting).

<sup>147</sup> See, *Witt v. State*, 387 So. 2d 922, 929 & n.25 (Fla. 1980); *People v. Maxson*, 759 N.W.2d 817, 822 (Mich. 2008).

<sup>148</sup> See *Teague v. Lane*, 489 U.S. 288, 302–03 (1989).

<sup>149</sup> *State v. Ragland*, 836 N.W.2d 107, 115–16. (Iowa 2013).

tree, which prompted that Court to apply *Miller* retroactively.<sup>150</sup> If other courts were to step back and look at the whole forest using a modified *Teague* standard, they too would be able to see *Miller v. Alabama* for what it is—a procedural rule that is part of a substantive shift in the law regarding how juveniles are treated in the criminal justice system, which deserves retroactive application.

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<sup>150</sup> *Id.* at 117.